

USDOL/OALJ Reporter

[*Webb v. Numanco, LLC*](#), 1998-ERA-27 and 28 (ARB Jan. 29, 1999)

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U.S. Department of Labor
Administrative Review Board
200 Constitution Ave, NW
Washington, DC 20210

ARB CASE NO. 98-149
ALJ CASE NOS. 98-ERA-27
98-ERA-28
DATE: January 29, 1999

In the Matter of:

JACK WEBB,
COMPLAINANT,

v.

NUMANCO,L.L.C.,
RESPONDENT

and

JACK WEBB,
COMPLAINANT,

v.

COMMONWEALTH EDISON,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant
Mr. John Gergets, Esq., *Chicago, Illinois*

For the Department of Labor
Steven Mandel, Esq., William J. Stone, Esq.
U.S. Department of Labor, Washington, D.C.

For Respondent Numanco LLC
Charles G. Bates, Esq., *Tulsa, Oklahoma*

For Respondent Commonwealth Edison Company
David W. Jenkins, Esq., *Chicago, Illinois*

**FINAL ORDER APPROVING SETTLEMENT, DISMISSING COMPLAINT,
AND VACATING ORDER OF ADMINISTRATIVE LAW JUDGE**

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1994). On July 18, 1998, the Administrative Law Judge issued

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a Recommended Decision and Order (R. D. and O.), in which he held that he lacked jurisdiction to consider the complaint because of a deficiency in the service of Complainant's request for a hearing in the case. The parties are now before the Board seeking approval of a Settlement Agreement and dismissal of the complaint. Additionally, Respondents and the Assistant Secretary for Occupational Safety and Health seek vacatur of the R. D. and O.

The request for approval is based on an agreement entered into by the parties, therefore, we must review it to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. 29 C.F.R. §24.6. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

Review of the agreement reveals that it may encompass the settlement of matters under laws other than the ERA. See Settlement Agreement ¶6. As stated in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2:

[The Secretary's] authority over settlement agreements is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute. See *Aurich v. Consolidated Edison Company of New York, Inc.*, Case No. [86-]CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Order on Remand, issued November 3, 1986.

We have therefore limited our review of the agreement to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegations that Respondents violated the ERA.

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Paragraph 7 provides that the Complainant shall keep the terms of the settlement confidential, with certain specified exceptions. Additionally, a letter from Respondent Commonwealth Edison dated January 5, 1999 states that they wish to "have the information contained in the settlement agreement withheld from public disclosure." We have held in a number of cases with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988)(FOIA) "requires agencies to disclose requested documents unless they are exempt from disclosure. . . ." *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services*, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. See also *Plumlee v. Alyeska Pipeline Services Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, Sec. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; *Davis v. Valley View Ferry Authority*, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, Jun. 28, 1993, slip op. at 2 n.1 (parties' submissions become part of record and are subject to the FOIA); *Ratliff v. Airco Gases*, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, Jun. 25, 1993, slip op. at 2 (same).

The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It also would be inappropriate to decide such questions in this proceeding.

Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. Part 70 (1995).¹

Paragraph 5 of the agreement could be construed as a waiver by Complainant of any causes of action he may have that arise in the future. As the Secretary has held in prior cases, see *Johnson v. Transco Products, Inc.*, Case No. 85-ERA-7, Sec. Ord., Aug. 8, 1985, such a provision must be interpreted as limited to the right to sue in the future on

claims or causes of action arising out of facts occurring before the date of the agreement. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986).

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The Board requires that all parties requesting settlement approval of cases arising under the ERA provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. *Biddy v. Alyeska Pipeline Service Company*, ARB Case Nos. 96-109, 97-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. Accordingly, the parties have certified that the agreement constitutes the entire and only settlement agreement with respect to the complainant's claims. *See* Settlement Agreement ¶11.

We find that the agreement, as so construed, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, we **APPROVE** the agreement, **VACATE** the R. D. and O. and **DISMISS THE COMPLAINT WITH PREJUDICE**. *See* Settlement Agreement ¶6.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Acting Member

[ENDNOTES]

¹ Pursuant to 29 C.F.R. §70.26(b), submitters may designate specific information as confidential commercial information to be handled as provided in the regulations. When FOIA requests are received for such information, the Department of Labor shall notify the submitter promptly, 29 C.F.R. §70.26(e); and the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. §70.26(e); the submitter will be notified if a decision is made to disclose the information, 29 C.F.R. §70.26(f). If the information is withheld and suit is filed by the requester to compel disclosure, the submitter will be notified, 29 C.F.R. §70.26(h).